Uniutama Management Holdings Sdn Bhd v Mata IT Services Sdn Bhd

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–110 OF 2005
HO MOOI CHING JC
5 MARCH 2009

Civil Procedure — Case management — Directions made by court during pre-trial case management — Failure by defendant to comply with court's direction — Defendant's counsel absent on subsequent case management date — Whether judgment entered for plaintiff — Whether defendant ought to apply to set aside judgment or appeal against it — Rules of the High Court 1980 O 34 r 7

Civil Procedure — Judgments and orders — Application for setting aside — Application to set aside judgment entered for plaintiff due to defendant's failure to comply with directions made by court during pre-trial case management — Whether defendant may apply to set aside judgment under O 34 r 7 of the Rules of the High Court 1980 — Whether defendant should appeal to Court of Appeal

The plaintiff/respondent had filed a writ seeking, inter alia, declaration, injunction and damages. On 24 October 2005, pursuant to O 34 r 4(2) of the Rules of the High Court 1980 ('RHC') the court directed that the statement of agreed facts, statement of issues to be tried, bundle of agreed documents, bundle of disagreed documents, bundle of pleadings and witness statements be filed within three months. On 12 May 2006, a hearing date was fixed for 12 September 2006. On 9 July 2006 the plaintiff filed the bundle of pleadings and plaintiff's documents. Although the agreed facts and issues to be tried were filed, they did not appear to be agreed at all as the documents only bore the signature of the plaintiff's solicitors. On 12 September 2006 the defendant/appellant's counsel requested a postponement as case management directions had not been complied with. On 12 December 2006 in the presence of counsels for both parties, the court gave further case management directions ie that the bundle of agreed documents, bundle of disagreed documents, summary of the plaintiff's case and the defendant's case and the witness statements to be filed within two months. On 11 March 2007, in the absence of the defendant's counsel, the plaintiff's counsel informed the court that the defendant had failed to comply with case management directions since they were first given on 24 October 2005. The court then proceeded to give judgment as prayed to the plaintiff and

dismissed the defendant's counter claim with costs. On 9 January 2008, the defendant applied for leave to make the application out of time under O 3 r 5 of the RHC and to set aside the judgment entered against it on 11 March 2007 pursuant to O 34 r 7 of the RHC. The application was disallowed and hence this appeal.

Held, dismissing the application with costs:

(1) If the defendant were dissatisfied with the decision, it should have proceeded by way of appeal. Although the order of the court was made in the absence of learned counsel for the defendant, it was clearly made under O 34 r 7 of the RHC for non-compliance with directions given under that order. It was not open to the defendant to apply to set aside the judgment under O 35 r 2 of the RHC as the judgment was not given in the absence of the defendant under O 35 r 1(2) of the RHC when the trial of the action was called on (see paras 3 & 5).

(2) Although the judgment was given in chambers, O 32 and in particular O 32 r 6 of the RHC were of no application as the judgment was not given pursuant to an application made by summons in Form 62. It followed a notice in Form 63. The instant application could be dismissed on this ground alone as the application was incompetent. The defendant should have applied for enlargement of time to file its appeal before the Court of Appeal, not the High Court, under r 93 of the Rules of the Court of Appeal (see paras 6–7); *Md Amin Md Yusoff & satu lagi lwn Cityvilla Sdn Bhd* [2004] 2 CLJ 57 referred.

(3) The reasons for the absence of learned counsel were, though not irrelevant, not pivotal, in this case as the judgment was not predicated on their absence in court but their total disregard of the court's directions. Not one word was addressed as to their failure to comply with directions given on 24 October 2005 and again on 12 December 2006 (see paras 8–9).

[Bahasa Malaysia summary

Plaintif/responden memfailkan writ menuntut deklarasi, injunksi dan ganti rugi. Pada 24 Oktober 2005, menurut A 34 k 4(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') mahkamah mengarahkan bahawa pernyataan fakta yang dipersetujui, pernyataan isu untuk dibicarakan, ikatan dokumen yang dipersetujui, ikatan dokumen yang tidak dipersetujui, ikatan pliding dan pernyataan saksi difailkan dalam tempoh tiga bulan. Pada 12 Mei 2006, tarikh perbicaraan ditetapkan pada 12 September 2006. Pada 9 Julai 2006 plaintif memfailkan ikatan pliding dan dokumen plaintif. Walaupun fakta-fakta yang dipersetujui dan isu-isu untuk dibicarakan telah difailkan,

kelihatan seperti mereka tidak bersetuju sama sekali memandangkan dokumen-dokumen tersebut hanya mengandungi tandatangan peguam cara-peguam cara plaintif. Pada 12 September 2006 peguam defendan/perayu memohon penangguhan memandangkan perintah-perintah pengurusan kes tidak dipatuhi. Pada 12 Disember 2006 dengan kehadiran peguam-peguam kedua belah pihak, mahkamah memberikan perintah-perintah pengurusan kes lanjutan bahawa ikatan dokumen yang dipersetujui, ikatan dokumen yang tidak dipersetujui, ringkasan kes plaintif dan defendan dan pernyataan saksi perlu difailkan dalam masa dua bulan. Pada 11 Mac 2007, semasa peguam defendan tidak hadir, peguam plaintif memaklumkan mahkamah bahawa defendan gagal untuk mematuhi perintah-perintah pengurusan kes memandangkan mereka diberikan pada 24 Oktober 2005. Mahkamah kemudiannya memberikan penghakiman sepertimana dipohon kepada plaintif dan menolak tuntutan balas defendan dengan kos. Pada 9 Januari 2008, defendan memohon kebenaran untuk membuat permohonan kekurangan masa di bawah A 3 k 5 KMT dan mengetepikan penghakiman yang diberikan ke atasnya pada 11 Mac 2007 menurut A 34 k 7 KMT. Permohonan tersebut tidak dibenarkan dan oleh itu rayuan ini dibuat.

Diputuskan, menolak permohonan dengan kos:

(1) Sekiranya defendan tidak berpuas hati dengan keputusan tersebut, ia sepatutnya dimulakan dengan rayuan. Walaupun perintah mahkamah dibuat semasa ketidakhadiran peguam bagi pihak defendan, dengan nyata ia dibuat di bawah A 34 k 7 KMT untuk ketidakpatuhan dengan perintah-perintah yang diberikan di bawah arahan tersebut. Defendan tidak boleh memohon untuk mengetepikan penghakiman di bawah A 35 k 2 KMT memandangkan penghakiman tersebut tidak diberikan semasa ketidakhadiran defendan di bawah A 35 k 1(2) KMT apabila perbicaraan tindakan tersebut dijalankan (lihat perenggan 3 & 5).

(2) Walaupun penghakiman tersebut diberikan dalam kamar, A 32 dan A 32 k 6 KMT secara khususnya tidak digunakan memandangkan penghakiman tidak diberikan menurut permohonan yang dibuat melalui saman dalam Borang 62. Ini diikuti dengan notis dalam Borang 63. Permohonan ini boleh ditolak atas alasan ini sahaja memandangkan permohonan tersebut adalah tidak kompeten. Defendan seharusnya memohon untuk lanjutan masa untuk memfailkan rayuannya di Mahkamah Rayuan, bukannya Mahkamah Tinggi, di bawah k 93 Kaedah-Kaedah Mahkamah Rayuan (lihat perenggan 6–7); *Md Amin Md Yusoff & satu lagi lwn Cityvilla Sdn Bhd* [2004] 2 CLJ 57 dirujuk.

(3) Alasan-alasan di atas ketidakhadiran peguam yang bijaksana walaupun tidak relevan, namun bukan merupakan paksi di dalam kes ini memandangkan penghakiman tersebut tidak berdasarkan

ketidakhadiran mereka di mahkamah tetapi ketidakpatuhan mereka terhadap perintah-perintah mahkamah. Tiada apa-apa yang dinyatakan mengenai kegagalan mereka untuk mematuhi perintah-perintah yang diberikan pada 24 Oktober 2005 dan sekali lagi pada 12 Disember 2006 (lihat perenggan 8–9).]

Notes

For cases on application for setting aside, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4032–4046.

For cases on directions made by court during pre-trial case management, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1642–1645.

Cases referred to

Md Amin Md Yusoff & Anor v Cityvilla Sdn Bhd [2004] 4 MLJ 446; [2004] 3 CLJ 88, CA (refd)

Md Amin Md Yusoff & satu lagi lwn Cityvilla Sdn Bhd [2004] 4 MLJ 441; [2004] 2 CLJ 57, CA (refd)

Sunway-PMI Pile Construction Sdn Bhd v Pembenaan Chan & Chua Sdn Bhd [2002] 7 MLJ 538; [2003] 5 CLJ 63, HC (refd)

Legislation referred to

Rules of the Court of Appeal r 93
Rules of the High Court 1980 O 3 r 5, O 32, r 6, O 34 rr 4(2), 7, O 35 rr 1(2), 2, Forms 62, 63

Mohd Hafiz (Vethanayagam & Associates) for the applicant.
Mohd Zahid (Syed Hussein & Rakan-Rakan) for the respondent.

Ho Mooi Ching JC:

[1] This is an appeal against my decision made on 22 January 2009 refusing with costs the application of the appellant ('the defendant') (encl 20), inter alia:

(a) for leave to make the application out of time under the Rules of the High Court ('RHC') O 3 r 5; and

(b) to set aside judgment which had been entered against it on 11 March 2007 by YA Dato' Zainal Adzam bin Abd Ghani pursuant to RHC O 34 r 7.

THE CHRONOLOGY OF EVENTS

[2] I set out below the chronology of events relevant to this appeal.

20 June 2005	The plaintiff filed a writ together with a certificate of urgency seeking, inter alia, a declaration that notices of termination issued by the defendant were illegal and unenforceable; an order that the plaintiff be allowed to continue with the obligations and responsibilities of the joint venture agreement dated 23 June 2004; and arrears of wages for the employees of the plaintiff since February 2005.
19 July 2005	YA Dato' Wan Adnan bin Muhamad granted an injunction restraining the defendant and its agents, etc from preventing the plaintiff and its agents from entering the Island Campus Training Centre for the purpose of carrying out works based on the joint venture agreement between the parties; and to restrain the defendant and its agents from informing the students or other parties that the joint venture agreement had been terminated.
24 October 2005	Pursuant to O 34 r 4(2) the court directed that the following documents be filed within three months:- (A) Statement of agreed facts; (B) Statement of issues to be tried; (C) Bundle of Agreed Documents; (D) Bundle of Disagreed Documents; (E) Bundle of Pleadings; and (F) Witness statements.
22 February 2006	Learned counsel for the plaintiff prayed for time to comply with directions as his firm had just taken over the matter from the previous solicitors.
12 May 2006	Encik Syaffie Naim ('SN') for the defendant mentioned the case before the deputy registrar, the plaintiff's counsel being absent. A hearing date was fixed for 12 September 2006.
9 July 2006	The plaintiff filed the bundle of pleadings and bundle of plaintiff's documents. Although the agreed facts and issues to be tried were filed, they do not appear to be agreed at all as the documents only bear the signature of the plaintiff's solicitors.
12 September 2006	Cik Ida Ruhayu bt Talib ('IR') for the defendant and mentioning for the plaintiff's counsel requested a postponement as case management directions had not been complied with.
12 December 2006	In the presence of Encik Zainal Abidin bin Darmawi for the plaintiff and Encik Syaffie bin Naim together with Cik Ida Ruhayu bt Talib for the defendant, the court gave further case management directions, ie that the following documents be filed within two months from that date: (a) Bundle of Agreed Documents; (b) Bundle of Disagreed Documents; (c) Summary of the plaintiff's case and the defendant's case; (d) Witness statements.

11 March 2007	Encik Ahmad Zahid bin Abu Hashim for the plaintiff, the defendant and its counsel being absent, informed the court that the defendant had failed to comply with case management directions since they were first given on 24 October 2005. The court then proceeded to give judgment as prayed to the plaintiff and dismissed the defendant's counterclaim with costs.
11 October 2007	The defendant filed an application (encl 17), inter alia, to reinstate its defence and counterclaim.
8 January 2008	Enclosure 17 was withdrawn by Encik Mohd Hafiz for the defendant and struck out.
9 January 2008	The defendant filed the application which is the subject matter of this appeal (encl 20) almost ten months after judgment was entered against it.

COMPETENCY

[3] I accept the submission of learned counsel for the plaintiff that if the defendant were dissatisfied with the decision of the court, it should have proceeded by way of appeal. Learned counsel made no reference to the RHC but only to reported cases which were appeals against judgments given under O 34 r 7. Although the order of the court was made in the absence of learned counsel for the defendant, it was clearly made under O 34 r 7 for non-compliance with directions given under that order (see the judgment in encl 16).

[4] In *Md Amin Md Yusoff & Anor v Cityvilla Sdn Bhd* [2004] 4 MLJ 446; [2004] 3 CLJ 88, the Court of Appeal allowed an appeal against a decision made under O 34 r 7 of the RHC and set aside the order of the learned High Court judge. Similarly, in *Sunway-PMI Pile Construction Sdn Bhd v Pembenaan Chan & Chua Sdn Bhd* [2002] 7 MLJ 538; [2003] 5 CLJ 63, the party dissatisfied with an order made under O 34 r 7 proceeded by way of appeal and not by way of summons in chambers. Learned counsel for the defence offered no answer to this submission.

[5] It was not open to the defendant to apply to set aside the judgment under O 35 r 2 as the judgment was not given in the absence of the defendant under O 35 r 1(2) when the trial of the action was called on. The action had not been set down for trial as the case management directions had not been complied with.

[6] Although the judgment was given in chambers, O 32 and in particular O 32 r 6 is of no application as the judgment (even if 'order' in that rule is

read to include a 'judgment') was not given pursuant to an application made by summons in Form 62. It followed a notice in Form 63.

[7] The instant application can be dismissed on this ground alone as the application was incompetent. The defendant should have applied for enlargement of time to file its appeal before the Court of Appeal, not the High Court, under the Rules of the Court of Appeal r 93 (see *Md Amin Md Yusoff & satu lagi lwn Cityvilla Sdn Bhd* [2004] 4 MLJ 441; [2004] 2 CLJ 57), instead of enlargement of time to file the application which is the subject matter of this appeal.

APPLICATION MISCONCEIVED

[8] Instead of treating the judgment as one under O 34 r 7, the defendant resolutely regarded it as one given in default of the presence of the defendant or its counsel on 11 March 2007. Almost entire affidavits were devoted to explaining the absence of learned counsel in charge, Puan Ida Ruhayu and the counsel she appointed to assist her, Encik Syaffie Naim. There is no reason to doubt that IR's daughter was sick and as she had accompanied her daughter to seek treatment at Penang Hospital, she was not present in court on 11 March 2007. Further, SN's absence was attributed to him entering the wrong date in his diary so that he attended court on 12 March 2007 instead of the appointed date. There was also an attempt to explain the ten months' delay in filing the application. To my mind, the reasons for the absence of learned counsel are though not irrelevant, not pivotal, in this case as the judgment was not predicated on their absence in court but their total disregard of the court's directions.

[9] Not one word was addressed as to their failure to comply with directions given on 24 October 2005 and again on 12 December 2006. Thus, the entire application was misconceived and it was not open to this court to join the defendant in treating the judgment in question as something it was not.

[10] For the reasons stated above, the application was dismissed with costs.

Application dismissed with costs.

Reported by Kanesh Sundrum